

Improving the Safety and Efficiency of Foreign Adoptions: U.S. Domestic Adoption Programs and Adoption Programs in Other Countries Provide Lessons for INS Reform

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IMPROVING THE SAFETY AND EFFICIENCY OF
FOREIGN ADOPTIONS:
U.S. DOMESTIC ADOPTION PROGRAMS AND
ADOPTION PROGRAMS IN OTHER COUNTRIES
PROVIDE LESSONS FOR INS REFORM

I. INTRODUCTION

Intercountry adoption (ICA) is the adoption of a child of one nationality by a parent or parents of another. From 1968-1986, the number of ICAs grew steadily at a rate of 11% per year, reaching about 10,000 in 1986. That number has leveled in the past decade to just over 9,000 in 1991, and 8,200 in 1994.¹ As China and Russia (two major sources of adoptees or "sending countries") open their doors to foreign adoptions, however, the numbers are likely to increase.²

Interest in ICAs has grown considerably in the last twenty years. While earlier in this century most adoptions were motivated by the desire to help a child out of a tragic situation, many couples in the 1990's look to adoption as a way to start a family.³ A rising infertility rate and an increased acceptance of single mothers have contributed to the growing demand for foreign adoptions. In addition, many adoption agencies have responded to the shortage of domestic babies by limiting their services to married couples without children.⁴ This move has drastically restricted domestic adoption as an option to prospective parents who are single, older, or already have a family.

Today, there are many needy foreign children and loving prospective parents for whom adoption would be a positive step. Yet, against this backdrop, Table I demonstrates that the number of ICAs has stagnated in the past five years. One reason for this stagnation is that many sending countries

¹ 1993 STAT. Y.B. (Immigration and Naturalization Service) 32, 51 (1994) [hereinafter "1993 INS Statistical Yearbook"]. The 1994 statistic is a preliminary figure. Telephone Interview with Michael Hoefner, Immigration and Naturalization Service (Apr. 3, 1995) [hereinafter "Hoefner Interview"].

² Telephone Interview with Mark Eckman, Staff Attorney, Datz Foundation (Apr. 3, 1995) [hereinafter "Eckman Interview"].

³ Mary C. Hester, Comment, *Intercountry Adoption from a Louisiana Perspective*, 53 LA. L. REV. 1271, 1272 (1993).

⁴ Susann M. Bisignaro, Comment, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13 DICK. J. INT'L L. 123, 124 (1994).

have closed their doors to foreign adoption out of a fear of baby-selling and other abuses.⁵ In addition, administrative bottlenecks in the United States have restricted entry visas for adoptees. The law now stands at a crossroads, and the challenge is to balance growing demand for ICAs with careful protection of each party's interests.

The United States is by far the largest receiving country of ICAs, and should take the lead in restoring trust in this process so that more sending countries do not halt or curtail ICAs. Through the Immigration and Naturalization Service (hereinafter INS), the agency that oversees ICAs, the federal government should also streamline its partnership with the states in processing foreign adoptions so that more prospective parents and children can be brought together.

The best models for reform of the federal ICA program are those that are already in place: U.S. state adoption laws and the ICA programs in other industrialized countries. These programs have evolved to regulate adoptions, and can be evaluated on their merits and operating history.

This note begins by discussing generally why ICA programs should be reformed rather than abandoned in the current climate of fear of abuses and frustration with delays. Then, the note examines three adoption programs: U.S. state domestic adoption programs, the current INS systems for foreign adoptions, and the Hague Convention proposals. Finally, evaluation of these models leads to specific suggestions on how to prevent abuse and improve the efficiency of ICAs in the United States by reform at the INS level.

Table 1 - ICAs in the United States 1986-1994⁶

<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>
9945	10097	9120	7948	7088	9008	6536	7348	8200

Table 2 -Limits or Bans on ICAs in Major Sending Countries 1985-1995

1995: Costa Rica⁷ - adoption agencies report ICA process has stalled

⁵ See Table 2 - Restrictions and Bans on ICAs in Major Sending Countries.

⁶ 1993 INS Statistical Yearbook at 32. The 1994 figure is preliminary.

⁷ Eckman Interview, *supra* note 2.

Russia⁸ - parliament approves new controls on ICAs by unanimous vote

1994: Guatemala⁹ - widespread threats against U.S. citizens engaged in ICA process

Ukraine¹⁰ - unanimous parliamentary vote to suspend ICAs

1993: Bosnia¹¹ - suspended ICAs for the duration of the war

People's Republic of China¹² - suspended ICAs

Romania¹³ - expanded bureaucratic procedures virtually halt ICAs

1992: Albania - suspended ICAs¹⁴

1991: Brazil¹⁵ - strict new ICA law

1988: South Korea¹⁶ - set goal of eliminating ICAs by the year 2000

1987: Haiti¹⁷ - suspended ICAs

Sri Lanka¹⁸ - suspended ICAs

⁸ INS, *State Dept. Instruct on New Russian Adoption Law*, 72 INTERPRETER RELEASES 332 (Mar. 6, 1995).

⁹ INS cable file HQ 204.22-C (May 4, 1994), reprinted in 71 INTERPRETER RELEASES 835 (June 27, 1994).

¹⁰ INS *Advises on Ukrainian Adoptions*, 70 INTERPRETER RELEASES 977 (July 26, 1993).

¹¹ Jim Muir & Tessa Boase, *ITN Reporter Fights Bosnia Over Child He Smuggled Out*, DAILY TELEGRAPH (LONDON), May 30, 1994, at 5.

¹² INS *Provides Guidance on Updating China Adoption Applications*, 70 INTERPRETER RELEASES 1642 (Dec. 13, 1993).

¹³ Mary Ann Candelario McMillan, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137, 143-44 (1993).

¹⁴ INS *Announces Suspension of Albanian Adoptions*, 71 INTERPRETER RELEASES 566 (Apr. 25, 1994).

¹⁵ McMillan, at 141.

¹⁶ *Korea Eases Way for Foreign Adoptions, But End Near*, LOS ANGELES TIMES, Apr. 17, 1994, at 2.

¹⁷ Hélène Gaudemet-Tallon, *Le Droit Français de L'Adoption Internationale*, 42 REVUE INTERNATIONALE DE DROIT COMPARE 567, 570 (1990).

¹⁸ *Id.*

II. THE ROLE OF INTERCOUNTRY ADOPTION

Even though the demographics of childless families in the United States and needy children overseas would support having an ICA system, some opponents question its legitimacy. They balk at the idea of moving children around the world, and are skeptical of the ability of governments to prevent ICAs from turning into a "market" in children. Specifically, ICA opponents argue that: (1) babies should only be placed domestically; (2) the United States should not waste resources on foreign children; and, most importantly, (3) foreign adoptions allow baby-selling. This section of the note addresses these concerns and defends the process of intercountry adoption.

Opponents of ICAs argue that orphans deserve placement in their own country with parents of their same ethnicity. Critics have cast doubt on the humanitarian nature of international adoption by focusing on the child's break with his or her native culture and ethnic heritage. This source of opposition has hit hard in England, leading to a serious resistance to government-sponsored ICAs.¹⁹ In fact, a recent editorial in a leading British newspaper condemned parents who adopt children from abroad as arrogant and racist.²⁰ Similarly, a self-help guide for prospective parents labels Canadian officials as unhelpful because of their reservations about the ethics of intercountry adoptions.²¹

In the United States, adoption workers are split on the propriety of interracial adoptions, including ICAs.²² State adoption laws generally bely a

¹⁹ Jeremy Laurance, *Over 40's Encouraged to Adopt*, TIMES (LONDON), Nov. 4, 1993. There were only about 50 officially-recognized ICAs in England annually before 1990. The unofficial total, however, was probably much higher. Rosie Waterhouse, *Despairing Search That Drives People to Illegality Abroad*, INDEPENDENT (LONDON), Oct. 15, 1994, at 3.

²⁰ Referring to the recent highly publicized case of a British couple who circumvented Romanian laws to adopt a baby girl, the author wrote that "the case and its coverage reveals an extraordinary set of assumptions. Primarily that poor countries do not have the right to protect themselves from those from the rich half of the world and that these people have acquired exemption from moral and legal accountability simply because they are better off." *Trading in Babies*, GUARDIAN (LONDON), Oct. 27, 1994, at 13.

²¹ JOHN BOWEN, A CANADIAN GUIDE TO INTERNATIONAL ADOPTIONS, xvi (1992).

²² Interestingly, most adoption workers in the late 1960's considered interracial adoptions a positive force in promoting integration. A 1972 speech by the president of the National Association of Black Social Workers (NABSW) ended this exuberance. Speaking before a group of mostly white parents who had adopted black children, he accused the audience of

preference for placing children with parents of the same ethnicity or race. The U.S. Indian Child Welfare Act of 1978, 25 U.S.C. §1901 (1988), also expresses a preference for Native American adoptive parents (although the Act allows adoption out to any family that can provide a good home in the best interests of the child). This trend has not significantly affected the ability of foreign adoptees to find placement in the United States, but concern about interracial adoptions could become a major hurdle to a successful ICA system.

Despite these concerns, domestic placement is often not a realistic option. The children who would most benefit from ICAs come from countries such as Russia or Guatemala which have severe economic problems, or from countries ravaged by the drug trade, such as Colombia.²³ As one author wrote recently, "[A]lthough the United Nations (U.N.) has expressly established rights for children, the economic and political realities of their native countries deprive these children of such basic rights."²⁴ For example:

- Over 1,000 homeless children (out of seven million total) die each year in Brazil at the hands of hired guns who protect stores from looting.²⁵
- In South Korea, a Confucian ethic that place a higher value upon blood lineage makes adopted children second-class citizens.²⁶
- In parts of Uganda hit hard by the AIDS epidemic, an estimated 25% of children have lost both parents.²⁷
- A 1989 report found that up to one half of children in Romanian orphanages did not survive the winter, often due to lack of heat, running water or sewage facilities.²⁸

"cultural genocide." Stephanie Sue Padilla, Note, *Adoption of Alien Orphan Children: How U.S. Immigration Law Defines Family*, 7 Geo. Immigr. L. J. 817, 822 (1993). Opinions on interracial adoptions today are polarized: "it all depends on where you are and whom you ask." *Adoption for Black Children: A Case Study of Expert Discretion*, in 1 RESEARCH IN LAW AND SOCIOLOGY 265, 294 (1978).

²³ 1993 INS Statistical Yearbook, *supra* note 1, at 51.

²⁴ Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L. J. 187, 189 (1994).

²⁵ *Id.* at 187.

²⁶ *Id.* at 188.

²⁷ *Id.* at 188-89.

²⁸ Hester, *supra* note 3, at 1273.

• One Hong Kong official noted that “overseas adoption is a lifeline for Hong Kong’s special needs children.”²⁹

Similar stories appear in almost every country, emphasizing the need for ICAs.

In addition, many children adopted abroad come from an ethnic or racial group on the lowest rung of the social ladder. For example, a significant number of the children adopted from Brazil are black, many from Spanish-speaking South America are Indian or mixed-blood (“mestizo”), and a significant number from India are very dark-skinned.³⁰ Opportunities in their native countries can be severely limited by their heritage or skin color, a fate from which the United States has traditionally offered an alternative.³¹ Thus, while ICAs might not be necessary in an ideal world, many children come from less than ideal situations. Intercountry adoptions offer hope in cases where domestic placement is not a viable option.³²

Some opponents of foreign adoptions argue that the United States has no obligation to foreign children and should not use limited domestic resources to care for them. Fewer than 10,000 foreign adoptees enter the United States annually, however. This represents a minute percentage of total immigration—only approximately one percent.³³ Also, careful checks on the adoptive parents’ finances will prevent these children from becoming public charges. Moreover, since most adoptees are infants and young children, they are unlikely to engage in criminal activity or take jobs from U.S. citizens. Rather, ICAs are an important alternative for U.S. citizens who are unable to have their own children.

The third and most politically damaging argument against ICAs is that they allegedly allow baby-selling. Charges of baby-selling have led to drastic curtailment of ICAs in some countries, including a strict new adoption act passed in Brazil in 1991, and expanded bureaucratic procedures in Romania that have made foreign adoptions there almost impossible. The

²⁹ *Trans-Racial Adoption*, ECONOMIST, May 14, 1994, at 12.

³⁰ Hester, *supra* note 3, at 1273.

³¹ Similarly, while Gypsies make up less than 15% of Romania’s population, half of all children in orphanages are Gypsies. Nick Thorpe, *Hope and Love Struggle to Prevail in Land of Orphans*, THE OBSERVER (LONDON), Dec. 26, 1993, at 7.

³² Liu, *supra* note 24, at 193-94.

³³ 1993 INS Statistical Yearbook, *supra* note 1, at 32.

extent of baby-selling cannot be easily determined because it is difficult to distinguish between innocent cash payments to intermediaries or government officials, and a true illicit market for infants. However, the media has found some instances of baby-selling and made the most of them. Consider, for example, the following first-hand account of the adoption scene in Romania: "By the time I reached Bucharest in February 1991 . . . the collision of West bloc wealth and East bloc poverty had created a burgeoning black market in babies, and every potential adopter had to find his or her own moral footing in a sordid and complex situation. It would take me weeks to realize that little of what I was asked to do to obtain a child sat easy on my conscience."³⁴ The details of many of these reports make them very believable.

Tragically, there are nearly seven million homeless children in Brazil, and some 200,000 orphans in Romania (as a result of the Ceausescu days of encouraging population growth by prohibiting contraception and abortion). Adoption is not a possibility for most of these children because of limits on foreign adoptions imposed by their own governments.

ICAs should not end because of concerns about baby-selling. Rather, receiving countries must develop stronger controls based on respect for the laws of sending countries and the best interest of the child. The United States can dramatically reduce the risk of baby-selling by reforming the current ICA system. Since most sending countries are inherently strained in their ability to police adoptions, the INS and the states must carefully verify the legality of all ICAs.³⁵

³⁴ Lee Aitken, *The High Price of a Baby's Love*, MONEY, Jan. 1, 1992, at 98. The same description of Romania continues with a series of increasingly bizarre stories:

[I] quickly encountered the whole range of adoption entrepreneurs: the driver-translators who charged a day rate to help you scour the countryside; the high-tech baby finders with answering machines and faxes who paid doctors as tipsters and charged a flat fee of \$3,000 or \$4,000 per baby . . . , the lawyers who could produce children mysteriously for even more money than that, though the actual legal process of adoption cost about \$6. *Id.* at 100, 103. At one hotel, an American woman was brokering \$6,000 babies out of a suite—an operation I called Babies in a Box. *Id.* at 111.

These stories have blanketed the world's press over the past few years, and have caused real concern about human rights, child abuse, and a lack of respect for developing countries. Some authors have termed ICAs a "new form of colonialism," whereby industrial countries exploit children as a natural resource. Liu, *supra* note 24, at 194-95.

³⁵ One author describes three interrelated reasons why sending countries cannot adequately police foreign adoptions. Bowen, *supra* note 21, at 4. First, acts that may seem unethical or unlikely to a prospective parent in a wealthy country may be appropriate and common in an

Overall, foreign adoptions serve a fundamental goal of U.S. immigration policy. Like the refugee programs, ICAs offer hope to children who have little opportunity to improve their situation, or to escape possibly life-threatening conditions.

III. STATE, FEDERAL, AND INTERNATIONAL ADOPTION PROGRAMS: MODELS FOR REFORM?

Before considering specific reforms of the current U.S. program, this note will describe current state, federal, and international adoption programs. First, state adoption programs offer important lessons for reform of the federal system. Consequently, the INS should shift some of the responsibility for intercountry adoptions to the states. Second, current INS regulations should be amended. The Service coordinates all foreign adoptions in the United States, and basic reforms would create a safer, more efficient system. Third, the Hague Convention, which has been the most common suggestion for ICA reform in the past two years, has many weaknesses that make it an incomplete remedy.

a. Domestic Adoptions Administered by the States

Most Americans would be surprised to learn that adoption developed only recently in domestic family law. As a common law country, the United States imported its case law from England, where legal rights and relationships were defined by blood in order to protect the landed aristocracy.³⁶ As one author wrote earlier this century, "[T]he English had an inordinately high regard for blood lineage and consequently the practice of adoption never acquired a foothold there."³⁷ Adoption did not enter English statutory law

underdeveloped country (the so-called "relative plight phenomenon"). Second, lack of a well-functioning legal system can lead to systematic governmental corruption. Third, U.S. dollars may exert excessive influence on biological parents and intermediaries in countries where the currency has very little relative value ("empowerment of wealth"). *Id.* at 5.

³⁶ Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745 (1956).

³⁷ *Id.* at 745.

until 1926.³⁸ Except for those states with some civil law heritage (such as Louisiana and Texas), most did not recognize adoption until the early 20th century.³⁹

As domestic adoption programs developed, the common law preoccupation with property rights became secondary to public sympathy for abandoned children.⁴⁰ From these origins came the American emphasis upon "best interest of the child," an amorphous balancing test applied today in a variety of family law contexts. The "factors involved in determining the best interest of a child are not capable of specification; rather, each case must be decided on its own facts and circumstances."⁴¹ Those factors generally include race, religion, continuity of residence, financial history, degree of bonding, and potential harm to the child.⁴² As early as 1935, the best interest test was being implemented in the form of investigations of the parties before finalization of a domestic adoption.⁴³

Today, adoption is firmly established in every U.S. state, and the federal government encourages adoption through two statutes.⁴⁴ All states have signed the Interstate Compact on the Placement of Children, which establishes an office in each state to coordinate adoptions.⁴⁵ Like most family law issues, authority over adoptions has settled with the individual states, many of which have a sophisticated adoption statute and program.⁴⁶

³⁸ Pedro F. Silva-Ruiz, *Intrastate and Intercountry Adoption in the United States*, 38 AM. J. COMP. L. 153 (1990).

³⁹ Huard, *supra* note 36, at 747, 748. Maryland passed the first adoption act in the United States in 1892. WAGGONER ET AL, FAMILY PROPERTY LAW 123 (1991).

⁴⁰ Huard, *supra* note 36 at 748.

⁴¹ *In re A.V.D.*, 815 P.2d 277, 282 (Wash. 1991).

⁴² Some authors have suggested changing the name of the test to the "least detrimental alternative" test, which reflects the reality that there is often not one definable best interest for the child. Marja E. Selmann, *For the Sake of the Child: Moving Toward Uniformity in Adoption Law*, 69 WASH. L. REV. 841, 844, (1994), citing JOSEPH GOLDSTEIN, ANNA FREUD, AND ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

⁴³ Huard, *supra* note 36, at 749.

⁴⁴ Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620 (1988) (federal funds provided for certain approved state adoption plans); Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5111 (1988) (calls for providing homes for children and eliminating barriers to adoption).

⁴⁵ For a review of the Interstate Compact on the Placement of Children, see 2 AM. JUR. 2D *Adoption* § 28 (1994).

⁴⁶ An adoption is a completely statutorily-created legal relationship. As one court wrote, adoptions should "find homes for children, not find children for families." *In re Harshey*, 341 N.E.2d 616, 619 (Ohio 1975). The court continued: "[S]uch a purpose is laudatory for it places the best interests of the child above the desires and needs of the adoptive parents." *Id.*

A domestic adoption typically consists of two steps: termination of the natural parents' rights and the subsequent vesting of custody with the adoptive parents. These steps are distinct, and are often separated by the fact that custody over the child will pass through an agency and then to the adoptive parent.⁴⁷

State adoption laws are not uniform, despite attempts to make them so.⁴⁸ Only five states have passed the revised Uniform Adoption Act of 1969.⁴⁹ However, many aspects of domestic adoptions serve as good models for an ICA program, including the consent of the biological parents, the need for counseling, and a focus on the best interest of the child. In addition, most states ban consideration for adoptions beyond expenses incurred, and attach criminal penalties to violations. Further, many also require abandonment or consent to relinquishment by the natural parents be a willful, positive act.

b. INS Policy on Foreign Adoptions

A brief discussion of the history and current structure of the INS program will serve as a useful basis for evaluating INS reform.

Like state adoption programs, the INS regulations on intercountry adoptions were a humanitarian response to a social problem. Following the Second World War, large numbers of European refugees came to the United States, including many children and infants legally classified as "homeless" or "parentless" under the Displaced Persons Act of 1948.⁵⁰ Since then, intercountry adoptions have been driven by wars, natural disasters, and economic depressions that have left children literally out in the cold. Other waves of

at 616. In other words, the adoption process should be liberally construed to protect the best interest of the child, particularly since the adoptive parents have no basic right to the child. 2 AM. JUR. 2D *Adoption* § 12 (1994).

⁴⁷ See *In re Baby Boy M*, 221 Cal. App. 3d 475, 478 (1990)(dictum)(relinquishing legal custody of a child to a licensed adoption agency can only be withdrawn by mutual agreement).

⁴⁸ California, for example, has a relatively long wait for adoption processing and easier revocation by the birth mother. Alternatively, Texas provides for a more expedited process and irrevocable consent, and requires payments to help the birth mother. Selmann, *supra* note 42, at 847. Among the most controversial areas of state adoption law and policy are: (1) the propriety of interracial adoptions; (2) whether to allow open adoptions (with full knowledge by the child of his or her birth mother); and (3) the degree of consent required of the biological father. *Id.* at 855.

⁴⁹ A new Uniform Adoption Act is in the final draft stage. *Id.* at 842.

⁵⁰ Pub. L. No. 80-774, 62 Stat. 1009 (1948). See also 59 Fed. Reg. 38,877 (1994).

ICAs came after the Korean and Vietnam wars.⁵¹ Just as the United States led common law countries in developing domestic adoption practices, it also quickly emerged as the largest receiver of foreign adoptees.⁵²

U.S. law provides two ways to adopt a foreign child.⁵³ First, the child may qualify for direct adoption if he or she has lived with the prospective U.S. citizen parent(s) for at least two years.⁵⁴ This generally applies to American families living overseas, and occasionally to parents located in the United States who have taken in an undocumented alien.⁵⁵

Second, and by far the more common situation, involves American parents who want to adopt a child from abroad but who have no direct link to the child. In this process, the INS plays the middleman among the various interests involved: the foreign government; the adoption agency; the U.S. state government; the U.S. federal government; the prospective parent(s); the biological parent(s); and the adoptee. The INS checks whether the prospective parents would provide a suitable home, and whether the biological parents, if any, have truly consented to the child's adoption abroad.⁵⁶ In these roles, the INS bolsters the work of the U.S. state or foreign country, creating a stronger protective web for the child.

The first step in the adoption process is usually the evaluation of the prospective parents, which can be done even before a child has been identified. Prospective parents must submit INS Form I-600A and are also subject to a home study based on a personal interview, home visit, and assessment of parenting ability and living conditions.⁵⁷ If the INS approves the form and the home study, called preprocessing, then the prospective parents must document that the child is an orphan.⁵⁸ This step may include written and witnessed consent of the biological parents.

⁵¹ Liu, *supra* note 24, at 192.

⁵² Margarette Driscoll, *Why Was It So Hard to Give Chica a Loving Home?*, SUNDAY TIMES (London), July 24, 1994, at 13.

⁵³ ICA law is covered generally by 8 U.S.C. §§ 1101, 1151-54, 1434; 8 C.F.R. § 204.1-3 (1994). See generally, H. Wayne Elliott, *International Adoptions: Step by Step*, 6 S.C. L. REV. 37 (1995).

⁵⁴ INA § 101(b)(1)(E), 8 U.S.C. § 1101(b)(1)(E).

⁵⁵ Elizabeth Bartholet, *International Adoption: Overview in ADOPTION LAW AND PRACTICE* § 11.03[3][c] (Joan Hollinger, ed. 1991). Adoptions of this type involve Form I-130 rather than the standard ICA Form I-600.

⁵⁶ 8 C.F.R. § 204.3(d).

⁵⁷ *Id.* at § 204.3(e).

⁵⁸ The INS will also require state preprocessing, if the state involved has such a procedure.

One major problem with the INS system is that the Immigration and Nationality Act (INA) contains no visa category for "adoptees." Rather, a foreign adopted child can only obtain a visa to enter the United States if he or she can be classified as an "orphan."⁵⁹ This requirement dates back to the post-World War II era, when most children were in fact parentless. The INS defines an orphan as one whose:

A) sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption, or

B) parents have both died, disappeared, abandoned the child, or have been permanently separated from the child.⁶⁰

As discussed below, this definition is deceptively restrictive and limits the number of ICAs in the United States.

The INS attempted a general reform of its ICA program through revised adoption regulations in October 1994, including an expansion of the meaning of certain words in the orphan definition.⁶¹ However, the current INS system still limits the number of foreign adoptions without providing adequate safeguards against abuses. Specific proposals for reform of the INS regulations, based on the lessons learned from evaluating state programs, can help improve the quality of the ICA system in the United States.

c. Hague Convention of 1993

Various international conventions have attempted to control the ICA process, but until recently all have stopped short of establishing true regulatory programs. The Hague Convention on Intercountry Adoption,⁶² completed in 1993 and presently signed by fourteen countries, goes a step further with concrete suggestions on how each participating country should structure its

⁵⁹ A "child who meets the definition of orphan . . . is eligible for classification as the immediate relative of a U.S. citizen." 8 C.F.R. § 204.3(a)(2) (1994).

⁶⁰ 8 C.F.R. § 204.3(d)(1)(A),(B),(C); INA § 101(b)(1)(F) (1994).

⁶¹ 59 Fed. Reg. 38,876 (1994).

⁶² Hague Convention on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, *reprinted in* 32 I.L.M. 1134 (1993) [hereinafter "Hague Convention" or "Convention"].

foreign adoption scheme.⁶³ Most importantly, the Convention calls for worldwide recognition of ICAs as a viable alternative for child placement.⁶⁴ In addition, the Convention requires each signatory country to set up a "Central Authority" to coo-ordinate ICAs.⁶⁵ These authorities would process foreign adoptions in conjunction with their international counterparts, license domestic adoption agencies, and generally police the system.

The Hague Convention is a step forward in international ICA regulation and provides a basic model for intergovernmental cooperation through the various state Central Authorities. A number of commentators have reviewed the Convention, and they generally favor its ratification by the United States.⁶⁶ However, the Convention has several major weaknesses that make it inadequate as an overall model for reform.

One weakness is that implementation is left largely to the participating countries, with only general guidance on how to structure the program and prevent abuse. For example, the Convention calls for "competent authorities" to take "all appropriate measures" to prevent baby-selling.⁶⁷ The treaty lacks sufficient details to guide countries toward compliance. Furthermore, as yet no country has ratified the treaty.⁶⁸ Therefore, even if all countries were theoretically able to carry out their designated role under the Convention, no country has agreed to do so.

Perhaps the greatest flaw of the Convention is its reliance upon Central Authorities in the sending countries to prevent abuses. Many of these

⁶³ Bisignaro, *supra* note 4, at 139.

⁶⁴ Hague Convention, *supra* note 62, at 32 I.L.M. 1139.

⁶⁵ *Id.*, Art. 6, at 32 I.L.M. 1140.

⁶⁶ The Convention is discussed in depth in Bisignaro, *supra* note 4; Lisa M. Katz, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283 (1995) (Convention is only a start in reforming ICA system worldwide); Holly C. Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference in Respect of Intercountry Adoption*, 14 U. PA. J. INT'L BUS. L. 623 (1994); Mary Ann Candelario McMillan, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137 (1993) (U.S. should ratify the Convention because coordinated international system would be preferable to inconsistent U.S. state laws); Padilla, *supra* note 22; Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L. Q. 53 (1994) (U.S. should amend INA to adopt Convention); Kristina Wilken, *Defining Family: Adoption Law and Policy*, 2 DUKE J. GENDER L. & POL'Y 85 (1995).

⁶⁷ Hague Convention Art. 4, *supra* note 62, at 32 I.L.M. 1139, 1140.

⁶⁸ Bisignaro, *supra* note 4, at 139. The 1994 INS regulations explicitly distance the Service from the Hague Convention, making it unclear when the United States will ratify the treaty. 59 Fed. Reg. 38, 877 (1994).

countries are in turmoil due to war or economic disaster, and may not be able to adequately police ICAs. In fact, many of the sending countries that have banned ICAs did so because they were unable to effectively control the process.⁶⁹ Canada provides one example of a Central Authority that has failed to work because of instability in sending countries. The Canadian government has established a National Adoption Desk (NAD) to coordinate ICAs and enter into agreements with foreign countries to facilitate adoptions.⁷⁰ Despite this national effort to encourage ICAs, there were less than 400 adoptions processed through the NAD between 1987 and 1992.⁷¹ After interviewing adoption workers, one author wrote that the failure of this system is due to difficulties in relying on bilateral agreements with certain foreign sending countries.⁷²

Therefore, the Hague Convention falls short of being a workable model for reform of the U.S. system, despite the fact that it appears to be one of the most popular options. While the Convention represents an important step forward in the slow process of fostering international cooperation on ICAs, reform should take place through the existing INS program, using U.S. state domestic adoption programs as a model.

IV. ANALYSIS AND SUGGESTIONS FOR REFORM

ICAs are an important option for U.S. citizens trying to start a family and for foreign children whose parents cannot care for them. The following section will describe: (1) why reform can best be achieved at the INS level; (2) how abuses of the system can be prevented; and (3) how the efficiency of the process can be improved. Where possible, examples from domestic adoption programs and ICA programs in other developed countries will be used.

a. Why reform at the INS level?

Reform can be best effectuated through the agency that links all

⁶⁹ See Table II, *supra*.

⁷⁰ Bowen, *supra* note 21, at 24. The province of Ontario has established direct links with thirteen countries through the NAD. *Id.* at 27.

⁷¹ *Id.* at 68.

⁷² *Id.*

interested parties. As one author recently wrote, "[a]midst the turbulent and seemingly unnavigable sea of foreign and state law, there remains one constant: U.S. immigration and naturalization law."⁷³

In one respect, reform at the INS level appears counterintuitive. If American states evaluate prospective parents, and foreign officials assess the biological parents' consent, then the governmental body with the greatest access to evidence and documents would be managing each part of the adoption.⁷⁴ However, there are two reasons why the INS must remain involved in the process. First, the INS must be involved because of its control over immigrant visas. Second, the INS has already taken an active lead in intercountry adoptions and developed considerable experience and expertise in the area. Therefore, the most practical way to reform the ICA process is by making the INS a more effective and responsible coordinator of the various interests involved.

b. How to prevent abuse of the ICA process

In addition to focusing world attention on the plight of orphans (which sending countries often resent), the world press has latched on to some egregious cases of baby-selling to impugn the entire ICA process.⁷⁵ A recent case in Israel featured "Baby Caroline," who was legally adopted from Brazil but consequently was taken from her adoptive parents after press reports that she had been kidnapped.⁷⁶ Similarly, a recent INS cable stated: "threats have been made against U.S. citizens in Guatemala as a result of rumors about U.S. citizens allegedly involved in the abduction, abuse and killing of Guatemalan children. . . . [Americans there should] avoid unnecessary public appearances with Guatemalan children."⁷⁷ This concern over U.S. citizens "stealing"

⁷³ Liu, *supra* note 24, at 205.

⁷⁴ Hester, *supra* note 3, at 1307. The Hague Convention also calls for a reduced INS role: "If the United States ratifies the International Convention on Intercountry Adoption [Hague Convention], the INS will no longer have to scrutinize the child or the adoptive parents because the Central Authorities will provide this service." Padilla, *supra* note 22, at 844.

⁷⁵ D. Kokkini-Iatridou, *L'Adoption en Droit International Prive Neerlandais*, in NETHERLANDS REPORTS TO THE 13TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 100, 102 (1990).

⁷⁶ Pinkas Shifman, *International Adoptions*, in ISRAELI REPORTS TO THE 13TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 35 (1990).

⁷⁷ INS cable file HQ 204.22-C (May 4, 1994), reprinted in 71 INTERPRETER RELEASES 835 (June 27, 1994).

children from poorer countries resonates with the history of colonialism in many of the sending countries.⁷⁸

To counter this bad press, the INS must strive to prevent abuse of the ICA process. An evaluation of state and foreign adoption programs provides five suggestions for making ICAs less open to charges of abuse:

- 1) require that ICAs be processed by licensed non-profit agencies;
- 2) ban money payments except for direct adoption expenses;
- 3) impose strict penalties for violation of INS regulations;
- 4) evaluate the best interest of the child in difficult cases; and
- 5) mandate home country physical examinations for adoptees.

Each of these suggestions is discussed in turn below.

i) Ban non-agency ICAs. Non-agency ICAs should be eliminated.⁷⁹ The difficulty of regulating independent attorneys and adoption brokers, and the greater risk of illegal or unethical activity, necessitates that all foreign adoptions take place through established agencies.⁸⁰ A ban on non-agency adoptions would prevent abuses and improve the image of the process.

First, agency licensing by a U.S. state usually requires that the agency take on the state's goal of fostering the best interest of the child.⁸¹ Even without state supervision, an agency agenda is more likely to comport with the child's best interest than the agenda of a for-profit intermediary.⁸² At least one for-profit agency has coordinated domestic adoptions.⁸³ While in business, the Southwest Adoption Center in Scottsdale, Arizona, charged a maximum \$24,500 fee, payable in advance. The agency grew into a \$3.5 million dollar business. According to one newspaper report, this agency achieved high standards of care for the birth mother and the prospective parents, including having adoptive parents follow a birth mother through the

⁷⁸ McMillan, *supra* note 13, at n. 21.

⁷⁹ For the purposes of this article, private or independent adoptions refer to adoptions not handled by an adoption agency. Agencies should be licensed in both the sending country and receiving U.S. state.

⁸⁰ Hester, *supra* note 3, at n. 7.

⁸¹ Liu, *supra* note 24, at n. 105.

⁸² Selmann, *supra* note 42, at 851.

⁸³ Lisa Gubernick, *How Much is That Baby in the Window?*, FORBES, Oct. 14, 1991, at 90.

process before beginning to arrange an adoption themselves.⁸⁴ However, most international adoption agencies are nonprofit, and allowing for-profit agencies to participate could easily damage the reputation of ICAs.

Second, agencies are more likely to find the best home for a given child because they often consider a variety of alternative placements, such as foster homes.⁸⁵ The agencies are not limited by the single-minded quest for an adoption that characterizes private adoption brokers. Agencies can also match a variety of children with a group of prospective parents, increasing their ability to serve the best interests of all concerned.⁸⁶

Third, agencies can accept custody of the child before placement in the United States.⁸⁷ Agency custody allows the child to be cleared for adoption abroad, and then matched with prospective parents. If the parents reconsider or are found unsuitable, the agency can find another set of parents without repeating the in-country adoption process or sending the child back to his or her native country.

Fourth, limiting ICAs to licensed agencies with a presence in both the sending and receiving countries will allow the sending countries to have a sense of accountability when a child leaves their country.⁸⁸ Ecuador, for example, requires that foreign adoptive parents appoint an Ecuadorian agent

⁸⁴ *Id.*

⁸⁵ The Hague Convention's treatment of alternative placement would be difficult to implement. Under the Convention, an ICA is appropriate only "if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests." Hague Convention, Art. 4(b), *supra* note 62, at 32 I.L.M. 1139. The Convention does not describe how this standard should be applied. For instance, what if a father with a history of alcoholism wants to adopt a child from his country, but a stable foreign couple is also available? Does the Hague Convention imply that the least desirable alternative is always leaving one's native country?

Rather than the Hague Convention approach, simply banning non-agency adoptions will increase the chance that alternatives will be considered. Returning to the alcoholic father hypothetical, an adoption agency operating in both countries would be more likely to consider relative placements than the private brokers allowed under the Hague Convention.

Further, the INS could add a requirement that an ICA petition contain an evaluation of the possibilities for alternative placement. However, such a requirement should explicitly recognize the limitations of such a subjective evaluation.

⁸⁶ Liu, *supra* note 24, at 200.

⁸⁷ 8 C.F.R. § 204.3(b). *Cf.* Australia, which allows children to enter the country under the custody of the Immigration Ministry for purposes of adoption. Ross L. Anderson, *International Adoption*, in *INTERNATIONAL PRIVATE LAW IN AUSTRALIA* 93 (1991).

⁸⁸ For example, the Australian government endorsed this proposal in 1986, in a major policy statement by the Council of Social Welfare Ministers and the Minister of Immigration and Ethnic Affairs. *Id.* at 99.

who must be available to answer questions about the validity of the adoption for five years.⁸⁹ Similarly, the government of Colombia has entered into a contract with New Partners, Inc., a U.S.-based adoption agency, to operate an orphanage in that country.⁹⁰ By having a presence in the sending country, New Partners has the opportunity to develop direct and lasting ties with Colombian officials.⁹¹ The development of a committed relationship between the agency and the sending country should increase trust in the ICA process.

One narrow exception to the non-agency ban should be recognized—adoption of a niece, nephew, or grandchild of the adoptive parent. The INS, and particularly the Board of Immigration Appeals, carefully scrutinizes these adoptions in order to insure that the process is not a ruse to circumvent immigration laws.⁹² The system in Japan can be regarded as an example for how this exception can be effectuated. The Japanese government does not have a formal ICA program because it sees little danger of abuse since 92.8% of its foreign adoptions involve close relatives.⁹³ There is no relevant statute on ICAs in Japan, and the entire process is guided by ambiguous standards based on public policy.⁹⁴ Judging from the Japanese experience, it is much less likely that a close relative adoption will lead to a situation of abuse. Further, the prospective parents may save substantial amounts of money by pursuing the ICA themselves.

Beyond the relatively rare case of adoption of a close relative (in countries other than Japan), agency adoptions provide greater safeguards for all concerned. The experience of many sending and receiving countries supports a ban on non-agency adoptions. Most receiving countries have already limited ICAs to either licensed agencies or to government-sponsored

⁸⁹ Liu, *supra* note 24, at 204. Similarly, Brazil uses a particular nonprofit agency, LIMIAR - USA, Inc., to facilitate ICAs. Bowen, *supra* note 21, at 73. LIMIAR collects and authenticates documents for the Brazilian government, and coordinates the required three post-placement reports. *Id.* at 78.

⁹⁰ Anna Borgman, *Adoptions Abroad Mix Highs, Lows*, WASH. POST, Jan. 8, 1995, at B3.

⁹¹ As a final example, South Korea requires that all ICAs be processed by four Korean adoption agencies. *Korea Eases Way for Foreign Adoption, But End Near*, LOS ANGELES TIMES, Apr. 17, 1994, at 2. Each of these agencies works with no more than one agency in each U.S. state, creating a predictable system with virtually no room for the corruption reported in other countries.

⁹² Padilla, *supra* note 22, at 838; Higgs v. Attorney General, Civil Action No. 89-1099 (TPJ) (D.D.C. Nov. 6, 1991), reprinted in BENDER'S IMMIGR. CASE REP. A3-20.

⁹³ Junichi Akiba, *International Adoption in JAPANESE REPORTS FOR THE 13TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 67, 75, 77 (1991).

⁹⁴ *Id.* at 75.

Central Authority.⁹⁵ Holland, for example, has banned non-agency adoptions, and requires that all agencies be licensed, non-profit, and based in Holland.⁹⁶ Finland has gone even further by creating an expert government panel that approves contact with foreign adoption agencies or governments in order to protect against unethical activity.⁹⁷

Sending countries also seem to prefer dealing only with adoption agencies. While a few Latin American countries favor non-agency adoptions, many countries have already moved to limit ICAs to licensed agencies.⁹⁸ For example, the People's Republic of China (PRC) has limited ICAs to the Chinese Central Authority, called the China Center for Adoption Affairs, and agencies licensed by the receiving state. Similarly, Russia—by far the largest sending country in Europe—has begun to develop new procedures for licensing foreign adoption agencies.⁹⁹

The United States has thus far declined to place a ban on non-agency adoptions, despite the many reasons to support it and the number of countries endorsing such a ban.¹⁰⁰ At the Hague Convention in 1993, the U.S. resisted an international ban on independent adoptions. Recently, the INS reiterated its determination to preserve non-agency adoptions in the comments to its amended regulations.¹⁰¹

Why does the United States continue to support non-agency ICAs? Some observers contend that private intermediaries are here to stay, and are "essentially a fact of life."¹⁰² Prospective U.S. parents, desperate to start a family, have increasingly sought out private intermediaries who claim they can

⁹⁵ Erik Jayme, *International Adoption in German Law* in GERMAN NATIONAL REPORTS IN CIVIL LAW MATTERS FOR THE XIIITH CONGRESS OF COMPARATIVE LAW 13, 14 (1990).

⁹⁶ Kokkini-Iatridou, *supra* note 75, at 104.

⁹⁷ Kaarina Buure-Hagglund, *International Adoption in Finnish Law* in FINNISH NATIONAL REPORTS TO THE 13TH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 35, 38, 45 (1990).

⁹⁸ Liu, *supra* note 24, at n.105. With non-agency adoptions in South and Central America generally, prospective parents must initiate contact directly with orphanages or biological parents. Bisignaro, *supra* note 4, at 126.

⁹⁹ INS, State Dept. Instructs on New Russian Adoption Law, 72 INTERPRETER RELEASES 332 (Mar. 6, 1995).

¹⁰⁰ Liu, *supra* note 24, at n.176.

¹⁰¹ 59 Fed. Reg. 38,878 (1994). The closest the INS has come to endorsing agency adoptions is in its instructions to Form I-600, which encourage petitioners to take advantage of the services of a recognized child welfare placement agency. Charles Gordon et al., *Immigration Law and Procedure* § 41.02[1][a] (1994) [hereinafter "Immigration Law and Procedure"]. See also Pfund, *supra* note 66, at 60-63 for a discussion of the debate over non-agency adoptions at the Hague Convention negotiations.

¹⁰² Kennard, *supra* note 66, at 648.

do a better, faster job. However, this claim is clearly false, as many countries have eliminated non-agency adoptions while maintaining active and effective ICA systems. Also, the danger of negative publicity hindering ICAs outweighs any potential increase in speed. As one author wrote of the 1990 ban on private ICAs in Colombia, “[t]hrough working through a bureaucracy makes the adoption more cumbersome and slower, it removes the profit incentive from private attorneys and baby-brokers, and makes the process safer for the adopting family.”¹⁰³

ii) Regulate adoption costs. One of the most damaging charges against ICAs is baby-selling. Indigent biological parents may be tempted to ask for money from wealthier U.S. citizens, and adopting parents may be willing to spend large amounts to create a family. One way to address this potential abuse is to remove the financial incentive from intermediaries, as most U.S. states have done.¹⁰⁴

Currently, the INS has no restrictions on adoption costs, which is striking considering that a standard ICA can run well over \$10,000.¹⁰⁵ Domestic adoption programs have two important lessons to offer. First, courts directly monitor costs in most states by requiring that all private adoption contracts proceed only with judicial approval.¹⁰⁶ Second, in most states, any money paid beyond “direct costs” is illegal and punishable as against public policy.¹⁰⁷ Similar policies are essential for ICAs.

Clearly, the most difficult part of the process is determining reasonable direct costs, as opposed to gratuitous payments. Once again, the INS can learn from the states, which have developed workable guidelines. Direct costs can include medical and lying-in expenses for the biological mother, legal

¹⁰³ McMillan, *supra* note 13, at 142. A similar view has been expressed about the Canadian system: “There are probably very few Canadians who are potentially unfit as parents who would go to the trouble and expense of adopting a child overseas. It is the danger of even one case of abuse arising that, unfortunately, justifies the existence of red tape that binds formal adoption procedures for everyone else.” Bowen, *supra* note 21, at 3.

¹⁰⁴ See generally, Kennard, *supra* note 66, at 637-39.

¹⁰⁵ For example, a brochure from the Datz Foundation, a non-profit adoption agency, lists the following rough costs for a standard ICA from China: donation to orphanage - \$3,500; Datz Foundation fee - \$4,000; local fees to Ministry of Justice, etc. - \$850; passport for child - \$100; local facilitator fee - \$500-3,000; visa fee at U.S. consulate - \$200; translation fees - \$500; medical report and photo - \$25; travel within China - \$300; round-trip airfare to China - \$1,500. The total, depending on the local facilitator’s fee, runs from \$11,475 to \$13,975.

¹⁰⁶ 2 AM. JUR. 2D *Adoption* § 43 (1994).

¹⁰⁷ See e.g., *In re Adoption of Kindgren*, 540 N.E.2d 485 (Ill. 1989).

fees, and court costs. There is a substantial body of case law defining each of these.¹⁰⁸ The Uniform Adoption Act goes further by requiring a full accounting of all adoption-related expenses.¹⁰⁹ Noncompliance with these rules can lead to the imposition of heavy fines or jail terms.¹¹⁰ Further, the enforcement process can be simplified by a ban on non-agency intermediaries.

Looking abroad, many receiving countries also bar gratuitous payments. Unaccounted payments for adoptions are illegal in most of Europe. Similarly, Israel will invalidate an adoption that has proceeded by improper payments, unless such strong ties have developed with the adoptive parents that the child's welfare would be threatened by separation.¹¹¹

Why then does the United States not impose a similar ban on financial incentives for ICAs? The rationale seems to be that the INS relies on the states and on stringent consent requirements by the biological parent(s) to insure the integrity of the process. However, this reliance is untenable for at least three reasons. First, approximately half of the states will accept a foreign adoption decree based on comity without its own review of the circumstances.¹¹² Second, state officials may have difficulty in evaluating the extent and reasonableness of payments made abroad. Third, states often do not regulate or even license intermediaries who simply "advise," rather than place directly.¹¹³ For these reasons, the INS should institute a system of accounting whereby all adoption expenses are documented and submitted to the Service. Expenses that significantly exceed the average for a given country should trigger closer scrutiny.¹¹⁴

¹⁰⁸ 2 AM. JUR. 2D *Adoption* § 48 (1994).

¹⁰⁹ Unif. Adoption Act § 10, 9 U.L.A. 45 (1988).

¹¹⁰ *State v. Clark*, 16 Kan. App. 2d 552, 826 P. 2d 925 (1992) (describing felony crime of intentionally and knowingly receiving excessive fees in connection with an adoption). In New Jersey, violation of a similar law (allowing only fees to an approved nonprofit agency and certain childbirth expenses) is a high misdemeanor punishable by 3-5 years in prison. *In re Baby M*, 537 A.2d 1227, 1240-41 (N.J. 1988).

¹¹¹ Buure-Hagglund, *supra* note 97, at 35; Shifman, *supra* note 76, at 35, 42.

¹¹² McMillan, *supra* note 13, at n.106.

¹¹³ Joel Thurtell, *Some Blame Lawyers in Costly East Bloc Adoptions*, DETROIT FREE PRESS, Oct. 13, 1991, at 1F.

¹¹⁴ The INS should be required to maintain basic records on the costs incurred for various types of expenses in each sending country. A simple computer program could keep these records. An ICA that exceeds the average cost for a given country would not result in a violation, but rather would flag the case for further investigation. As described *infra*, U.S. states have well-established programs for evaluating adoption costs, and ICAs flagged by the INS could be referred to the appropriate state official for review and possible prosecution.

One might argue that illegal payments could still be made abroad and then left out of accountings submitted to the INS. However, the dangerous consequences of a rumor of baby-selling make it necessary that the INS have at least a basic program to monitor costs. Furthermore, civil and criminal penalties for violations will provide an added incentive to comply, while limiting intermediaries to licensed agencies will increase the likelihood of compliance.¹¹⁵

iii) Impose penalties for violations. The INS should impose penalties for violations. In spite of the benefits that penalties would engender, the INS has explicitly resisted this position. For example, the INS specifically rejected the possibility of monitoring home study preparers in its October, 1994 regulations.¹¹⁶ The INS does not keep track of the quality of home studies written by a given individual or agency. Further, it will not deny validity to a home study merely because its author has consistently submitted shabby or fraudulent work.¹¹⁷ The Service has also decided not to require home study preparers to submit their reports under penalty of perjury because, "the proceeding is between the prospective adoptive parents and the INS only."¹¹⁸ In deferring to the states on the enforcement of home study quality, the Service creates no disincentive for abusing the system.¹¹⁹

In contrast, many other countries have enacted sanctions for violation of ICA laws. For example, Sri Lanka imposes a maximum 20 year sentence for giving consideration for an adoption.¹²⁰ Similarly, Romania has reacted to widespread abuse of its adoption system with a stiff one to five year prison term for violating the new state adoption law.¹²¹ These regulations strongly deter abuse of the ICA system.

Similarly, many U.S. states impose stiff penalties for buying and selling children.¹²² Louisiana, for example, imposes a fine of \$5,000 and/or

¹¹⁵ In addition, while the INS cannot monitor every payment, the press will often be looking for violations, and a media report could also serve as a trigger for an investigation and possible prosecution.

¹¹⁶ A home study is an examination of the environment that the prospective parents can provide for the child. It usually includes interviews, visits and background checks.

¹¹⁷ 59 Fed. Reg. at 37,789 (1994).

¹¹⁸ *Id.* at 38,880.

¹¹⁹ *Id.* at 38,879.

¹²⁰ *Tough Laws To Prevent Child Trafficking in Sri Lanka*, XINHUA NEWS (People's Republic of China), Apr. 19, 1994; Buure-Hagglund, *supra* note 97, at 42.

¹²¹ McMillan, *supra* note 13, at 144.

¹²² Gubernick, *supra* note 83, at 92.

five years in jail for selling minors.¹²³ The INS could take advantage of these state laws by reporting suspicions of baby-selling to the states for possible prosecution.

However, even if states are able to monitor baby-selling, there is no danger in being overcautious in an environment where even a single incident of baby-selling could halt adoptions from an entire country. As one commentator has noted, the "Third World alone will never be in a position to eradicate abusive practices as long as industrial countries both allow prospective adoptive parents to act on their own, and close one or both eyes to gross violations of children's rights."¹²⁴ Perhaps we have opened one eye as far as state practices, however, the danger of abuse requires the INS to open the other eye by instituting federal penalties.

iv) Institute a 'best interest inquiry' in conjunction with INS rules. One might argue that the INS rules currently err on the safe side by limiting visa issuance to a narrowly defined orphan class, and that a broader definition could allow abuses.¹²⁵ Under current law, however, there is a *de facto* system of trumping INS rules—members of Congress and Senators have been rather willing to intercede in a stalled adoption.¹²⁶ Elected representatives are often drawn to adoption cases for personal and political reasons. Rather than leaving the ICA process open to such behind-the-scenes activity, it would be safer to create a formal method of injecting equity into the process. The traditional family law test—the "best interest of the child"—could be used as a model for adjudicating difficult or borderline ICA cases.

A best interest evaluation could be made by any party, such as a prospective parent who has technically violated the rules but has already

¹²³ La. Rev. Stat. § 14:286(D) (West 1994). See also *Matter of Adoption of a Child by N.P.*, 398 A.2d 937, 940 (N.J. 1979) (adoptive parents found guilty of criminal violation for evasion of adoption law by using unauthorized intermediary and making illegal payments to secure adoption of Chilean baby); Hester, *supra* note 3, at 1274 n.17.

¹²⁴ Marie-Francoise Luckier-Babel, *Intercountry Adoption and Trafficking in Children: An Initial Assessment of the Adequacy of the International Protection of Children and Their Rights*, 62 INT'L REV. PENAL L. 799, 815 (1991).

¹²⁵ For example, a recent article on the adoption of children from Hong Kong to the United Kingdom expressed concern that a best interest inquiry could become a way to avoid formal immigration requirements. Elizabeth Phillips, *Adoption*, 16 HONG KONG L. J. 393 (1986). The current state of British ICA law is that "best interest" can outweigh any other single factor, but not all other factors combined. *Id.* at 394 n.17.

¹²⁶ Telephone Interview with Mark Eckman, Staff Attorney, Datz Foundation (Feb. 7, 1995).

bonded with the child, or an uncle of the child who alleges that a private lawyer has paid the biological parents for their consent to the adoption. The evaluation should spell out clearly why the INS decision should be trumped and what the competing factors are.¹²⁷ In practice, best interest would likely be invoked by the prospective parents, the adoption agency, or a state official. To be truly equitable, a “best interest trump” should be available both to support an adoption and to oppose one.

Since the child and natural parents are rarely in a position to make a sophisticated challenge to stop an adoption, the INS should take a further step toward state family law and institute a system of legal guardians for the child. A “law guardian” or its equivalent represents the point of view of the child.¹²⁸ Thus, if there were a concern about baby-selling or a delicate question of balancing the child’s interests in a complex situation, the best interest of the child would be better protected.

Many U.S. states provide for the appointment of law guardians (or the equivalent) when the adoptive parents’ interests are significantly different from those of the child. In New York State, a law guardian must be appointed in foster child adoptions where consent is opposed or if the child is not placed within six months.¹²⁹ In addition, a Family Court judge may, on her own motion, appoint a law guardian for a child at any point.¹³⁰ This type of system would work well in the context of ICAs.

As a further example, Germany appoints a law guardian for foreign adoptees for just this reason.¹³¹ The INS could choose to employ a small corps of law guardians on staff to monitor ICAs. They would have an advantage over regular INS personnel since they would specialize in ICAs. However, the cost and start-up time of such a program make it unlikely. Rather, states could be encouraged to appoint law guardians for foreign adoptees, with the INS supplying information on the native country that the average U.S. law guardian would not have.

¹²⁷ Courts have attempted to implement the “best interest test” through a balancing of such factors as continuity of residence, prospective parents’ financial status, history and ability to provide a nurturing environment. Selmann, *supra* note 42, at 843-44.

¹²⁸ Joseph R. Carrieri, *The Foster Child 1989: From Abandonment to Adoption*, in PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 111 (1989).

¹²⁹ N.Y. Fam. Ct. Act § 249(a) (1994).

¹³⁰ *Id.*

¹³¹ Jayme, *supra* note 95, at 20.

Even if the INS does not choose to add the cost of appointing law guardians, there is still a place for the best interest trump in ICAs. In Germany, for example, the best interest of the child can supersede the default rule of deferring to the adoption laws of the child's native country.¹³² This might occur in a situation where the child's biological mother would be endangered by a local requirement that she legally abandon the child in open court.¹³³ Similarly, Holland permits exceptions to the requirement that no more than 40 years of age separate the child and prospective parents, if it is in the best interest of the child.¹³⁴ Once again, this type of best interest analysis would be well-suited to the INS program.

An article on adoption by the Dean of the University of Pretoria Law School praised the U.S. best interest test for domestic adoption as providing flexibility in light of changing social and political situations.¹³⁵ He argued that South Africa needs flexibility to adjust to uncertainty about reactions to interracial adoptions. Similarly, the United States also needs flexibility in ICAs to deal with rapidly changing social, political and economic conditions in the sending countries, and to avoid overly rigid reliance on wooden rules.¹³⁶ With many competing interests in an ICA, the INS should give weight to claims that the Service values the child's best interest by actually setting up a mechanism for looking through the child's eyes in tough cases.

v) Require Physical Exams of Adoptees. The fear of immigrants carrying disease into the United States also threatens the reputation of the ICA program. Like the charges of baby-selling, reports of diseases could easily explode in the media and threaten domestic support for ICAs. For example, a recent New England Journal of Medicine study found that 73% of foreign adoptees had infectious diseases, many of which are not detected by a regular physical examination.¹³⁷ Many of those with infectious diseases suffered from

¹³² *Id.* at 19.

¹³³ *Id.* at 20.

¹³⁴ Kokkini-Iatridou, *supra* note 75, at 102.

¹³⁵ D. J. Joubert, *Interracial Adoptions: Can We Learn from the Americans?*, 110 S. AFR. L. J. 726 (1993).

¹³⁶ See also, McMillan, *supra* note 13, at 162. Referring to the Hague Convention's public policy exception, similar to a best interest trump, the author wrote that "a rule of absolute recognition could have been used by unscrupulous individuals to undermine some of the protections the Convention sought to ensure." See generally, Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, in 13 B.U. INT'L L.J. 163 (1995).

¹³⁷ *Children Adopted Abroad Have Undetected Diseases*, WALL ST. J., Aug. 15, 1991, at 4.

intestinal parasites, which are not a major health hazard in this country. However, the study provoked an article in the Wall Street Journal advocating better screening of adoptees for diseases.

All adult applicants for legalization or adjustment must undergo a physical examination for gonorrhea, granuloma inguinale, infectious leprosy, HIV, lymphogranuloma, infectious-stage syphilis, and active tuberculosis.¹³⁸ The INS could relatively easily extend this requirement to include foreign adoptees under the age of 15, perhaps excluding diseases not common in children. The INS identifies U.S. Public Health Service and local doctors abroad who perform the medical examination for adults, so an infrastructure is already in place.¹³⁹ In addition to assuaging public concerns about adoptees carrying diseases to the United States, physical exams in the home country could encourage early treatment of other ailments.

c. How To Increase the Number of ICAs.

Just as the INS must work to prevent abuses to preserve the trust of the sending countries, it must also speed up the process to meet the needs of children and parents. These twin goals may be difficult to reconcile, and efforts to expedite the ICA process should be weighed against the danger of abuse of the system. The adoption of one of the following three proposals would likely increase the number of ICAs: 1) Create a new visa category of "adoptee" in the INA; 2) Expand the role of the federal government in collecting and disseminating information on policies and conditions in sending countries; and 3) Require state preprocessing of all prospective parents.¹⁴⁰

i) Create a new visa category of "adoptee." Unlike the true orphans who came to the United States after World War II, many children today arrive

¹³⁸ INA § 212(g); 22 C.F.R. § 42.66; 42 C.F.R. § 34.2(b); Immigration Law and Procedure, *supra* note 101, at § 51.06(2)(d)(ii).

¹³⁹ 8 C.F.R. § 234.2(a).

¹⁴⁰ There is another very simple way to improve the efficiency of the ICA process: require that adoption-related governmental correspondence from consulates overseas be sent by fax or other expeditious means. Eckman Interview, *supra* note 2. The consular officer is the first line of review for the I-600 petition for classification as an orphan, which can either be approved or forwarded. 8 C.F.R. § 204.3(k)(2). Often when a petition has not been approved, it is forwarded to an overseas Service office by surface mail, potentially causing serious delays. *Id.* at 204.3(h)(11). Costs of sending the documents should be charged to the prospective parents, for whom the charge will be relatively small since the standard ICA costs over \$10,000.

as adoptees—they are given up for adoption rather than being parentless. Yet, the INA requires these children to fit into the orphan definition in order to obtain a visa. Adherence to the orphan definition makes the INS a potential bottleneck in an intercountry adoption.

For example, the INS does not recognize the “relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption” as abandonment which would confer orphan status.¹⁴¹ Under this definition of orphan, the Service would not approve an orphan visa for a child whom both biological parents want to grow up in the United States.¹⁴² Similarly, the INS limits release for adoption to a “sole or surviving parent [who] is incapable of providing the proper care.”¹⁴³ As such, a single mother cannot release her child for adoption in the United State unless she is “unable to meet the child’s basic needs.”¹⁴⁴ Current U.S. law does not allow these children to qualify as orphans even if an American couple is ready to take the child and the resulting adoption is valid in both the U.S. state and the foreign country.¹⁴⁵ Creating a new category for “adoptees” would allow the Service to get around these artificial restrictions and to increase the number of children eligible for ICAs.¹⁴⁶

As a practical matter, this change has already begun with the expanding definition of orphan over the past half-century. For example, the Board of Immigration Appeals (BIA) has held that a biological father can “constructively” abrogate parental rights to make a child an eligible orphan under INA Section 101(b)(1)(F).¹⁴⁷ In a similar expansion of definitions, the INS allowed a grandmother to adopt where the mother could not support the child financially and the father was deceased. The most recent ICA regulations include an even broader conception of orphan through expanded definitions of “desertion by both parents,” “disappearance of both parents,” “incapable of providing proper care,” “loss of both parents,” and “separation from both

¹⁴¹ 8 C.F.R. § 204.3(b).

¹⁴² 59 Fed. Reg. 38,878 (1994).

¹⁴³ 8 U.S.C. § 1101(b)(1)(F) (1994).

¹⁴⁴ 8 C.F.R. § 204.3(b).

¹⁴⁵ Padilla, *supra* note 22, at n.174.

¹⁴⁶ Pfund, *supra* note 66, at 71.

¹⁴⁷ In re Naome Melendez, No. A27-260-666 (BIA Aug. 13, 1992), *reprinted in* 10 Immig. Rptr. B1-99 (constructive abrogation by natural father made natural mother sole parent under INS regulations).

parents.”¹⁴⁸ However, these improvements still needlessly restrict ICAs to the orphan definition.

If the INS decides to keep the useful but restrictive orphan definition, the INA could still be amended to add a new category of adoptee as follows: A child, under the age of sixteen at the time the petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an adoptee as a result of an irrevocable written release by both parents of the child, or by the single or surviving parent, to a nonprofit adoption agency recognized in the foreign sending country.

Further, definitions of key terms could be provided in the INS regulations:

(1) Irrevocable written release: a document written in both the parents’ native language and in English, which states clearly that the child is being released for emigration and adoption in the United States, that the parent or parents have received counseling on their decision by a representative of the adoption agency, and that the release is irrevocable from the time of signing the release. The release must be signed by the parent or parents and witnesses. A separate statement signed by a representative of the adoption agency on penalty of perjury must accompany the irrevocable written release attesting that the agency has provided counseling for the parent or parents and that to the best of his or her knowledge the release complies with applicable U.S. state law, INS regulations, and the laws of the foreign sending country.

(2) Nonprofit adoption agency: an agency licensed to perform adoptions in at least one U.S. state and recognized by a competent authority in the foreign sending country in accordance with the laws of that country. The agency must operate on a nonprofit basis, and must specifically comply with any laws or regulations of the foreign sending

¹⁴⁸ 59 Fed. Reg. 38,877 (1994).

country regarding organizations that can handle intercountry adoptions.

(3) Single parent: the child's parent when the other biological parent has permanently abandoned the child, deserted the child, or disappeared.

(4) Surviving parent: the child's living parent when the child's other parent is deceased, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act.

Note that this proposed definition of adoptee protects the parents and the child by requiring counseling before signing the release, limiting ICAs to licensed nonprofit agencies, requiring the agency representative to attest to the validity of the consent to the extent of the representative's knowledge on penalty of perjury, and by requiring compliance with U.S. state and foreign sending country laws. The definition also offers the advantage of not forcing the parents to engage in the fiction of classifying the child as an orphan.

While the Department of Justice continues to believe that the "definition of orphan guards against the splitting of intact, functioning foreign families," that definition did not stop large scale baby-selling in Romania in the last several years.¹⁴⁹ An artificial and illusory definition of "orphan" is not effective and will keep many children from being adopted in the United States. New controls, as described above, need to be implemented to protect foreign children and families.

ii) Require the Federal government to expand its role as an information source. Most European countries and the Hague Convention have endorsed the idea of a central repository of ICA information. The INS should follow suit by expanding the federal government as a source of information on adoption conditions worldwide. Up-to-date information on a sending country's policies and social situation enable prospective parents to better navigate the waters of foreign adoption.¹⁵⁰ This is particularly true since busy

¹⁴⁹ Padilla, *supra* note 22, at 838.

¹⁵⁰ Gaudemet-Tallon, *supra* note 17, at 570. A review of ICAs in France stressed the importance of good information in expediting the process. *Id.*

“front line” consular officers or INS personnel may not have up-to-date information.¹⁵¹

The obvious choice for a source of information in the United States is the agency that has already begun to fill this role: the Office of Citizen Consular Services (CCS) at the State Department. Currently, CCS monitors information abroad that would be of interest to U.S. citizens. In the adoption context, CCS issues bulletins to the INS describing significant developments in sending countries and maintains a telephone recording on adoption conditions worldwide. For example, in 1993, CCS offered to contact all prospective U.S. parents seeking to adopt from the PRC when the agency learned that a moratorium on ICAs there might cause immigration papers to expire.¹⁵²

To date, CCS information has been limited to major negative effects on the ICA process. In addition, the information provided by CCS tends to be conservative, so that agencies are sometimes forced to rely on their own contacts abroad for accurate information.¹⁵³ CCS bulletins could be relatively easily expanded to include policy changes in sending countries. Then, either CCS or the INS could inform all licensed agencies (not a prohibitively large number). The INS should also keep a mailing list of these agencies and allow each agency to submit information or experiences that might be useful to the others, including information from their own contacts. This process could take many forms, such as an informal newsletter or computer bulletin board service.

Disseminating information will increase the ability of an agency to process ICAs. It will also facilitate adoption from lesser-known sending countries to reduce adoption “stampedes” from the few well-publicized countries.¹⁵⁴ A federal information source would also help state officials and

¹⁵¹ Such a situation has been observed in Canada, where the accuracy and consistency of information on adoption conditions worldwide seems to improve as one goes up the immigration hierarchy. Bowen, *supra* note 21, at 38.

¹⁵² INS Provides Guidance on Updating China Adoption Applications, 70 INTERPRETER RELEASES 47 (Dec. 13, 1993).

¹⁵³ Eckman Interview, *supra* note 2.

¹⁵⁴ For example, news reports in the United States about the shocking conditions in Romanian orphanages led to one such adoption stampede. See note 34 *supra*. The resulting abuses eventually led the Romanian government to crack down on adoptions.

adoption agencies understand the rules of countries that do not have well-functioning legal systems or that rely on customary law (rather than positive law) for adoptions.¹⁵⁵

iii) Require state preprocessing of prospective parent(s). The INS should require state preprocessing before moving forward on the ICA application (Form I-600 or I-600A).¹⁵⁶ Thus, states would evaluate prospective parents through a home study, interview and background check. Currently, only a few states have formal preprocessing procedures for ICAs, and the INS requires compliance with them where they exist.¹⁵⁷ Universal preprocessing would speed the ICA process by: 1) providing adoption agencies with the ability to tell foreign governments that prospective parents have been carefully checked by their state; 2) expediting readoption proceedings after the child comes to the United States;¹⁵⁸ and 3) avoiding the difficulty of having INS preprocessing expire while waiting for an adoption.

For instance, one author argues that mandatory re-adoption in the U.S. state creates an unnecessary hurdle for adoptive parents.¹⁵⁹ However, since most of the expense and aggravation in ICAs comes from the adoption process in the sending country, minimal U.S. preprocessing and re-adoption

¹⁵⁵ Hester, *supra* note 3, at 1281. Some countries treat adoptions as a non-legal process that is done by custom, unlike the United States, which is highly formalistic and based on positive, written law and policies. *See, e.g.,* Matter of Khatoon, 19 I. & N. Dec. 153 (BIA July 31, 1984), *reprinted in* 1 Immig. Rptr. B1-143 (Muslim adoption in India not recognized because statutory law of India does not recognize adoption); *Kaho v. Ilchert*, 765 F.2d 877 (9th Cir. 1985) (customary adoption in Tonga recognized by INS because sufficient legal status created). State agencies may have difficulty in evaluating the validity of a customary adoption, even if it is fully recognized in the sending country.

¹⁵⁶ The requirement of preprocessing might not be terribly burdensome. First, state adoption procedures are well-developed. Second, many receiving countries require readoption once the child enters the country, *See e.g.,* Jayme, *supra* note 95, at 16.

¹⁵⁷ 8 C.F.R. § 204.3(d)(1)(iv)(B)(3). New York, for example, requires proof of consent by the biological parents and compliance with the laws of the sending country beyond just a foreign adoption decree. N.Y. Dom. Rel. § 115a.1 (1994). *See also* Bartholet, *supra* note 55, at § 11.04(2)(b).

¹⁵⁸ This is particularly important since a state court may not recognize an ICA if the court feels that it took place without proper due process. Bartholet, *supra* note 55, at § 11.04(4). Also, in some states, failure to comply with preprocessing requirements can result in a waiting period before finalizing the adoption in state court. *Id.* at § 11.04(2)(a). Thus, the child would not have the benefits of being legally part of his or her adoptive family (such as inheritance rights, etc.) for a period of time.

¹⁵⁹ "The necessity of adopting the same child twice, once in each country, creates an exhausting, expensive and aggravating procedure." Bisignaro, *supra* note 4, at 126.

requirements should add little extra difficulty. In addition, as discussed above, many sending countries do not have a well-functioning legal system, making careful inquiry in the United States a necessary guard against abuses.

The federal government should pressure all states to institute preprocessing requirements. This could easily be done by offering funding or exemption from current INS preprocessing rules if a state submits an approved program for foreign adoptions. For example, the Child Abuse Prevention and Treatment and Adoption Reform Act provides federal funds to states that have approved programs for adoption of children in foster homes.¹⁶⁰ Similarly, the federal government successfully linked continued highway funds to state enactment of a drinking age of 21.¹⁶¹ INS funds for the states could come out of the money it saves from streamlining its own role, and states would have an added incentive to participate because it would give them more control over the process.

The INS could drop its own home study requirements in favor of state preprocessing.¹⁶² Among the main reasons for the INS to reject prospective parents are: sporadic employment record; appearance on the welfare rolls; arrest or conviction; late rent payments; and difficulty in caring for their own children.¹⁶³ These factors could just as easily (if not better) be evaluated by state officials experienced in family law and geographically closer to the records needed.¹⁶⁴ Deferring to state preprocessing would make the ICA system more efficient and allow more adoptions to take place.

V. CONCLUSION

Demographics favor intercountry adoption. There are tens of thousands of parents seeking to adopt and millions of children without

¹⁶⁰ 42 U.S.C. §§ 5111(b)(1) (1988). See e.g., 60 Fed. Reg. 18,107 (1995) (Department of Health and Human Services will provide money to states under the Act for demonstration programs that encourage adoptions by minority families, or of children in foster homes or children with special needs).

¹⁶¹ Surface Transportation Assistance Act of 1982, Pub. L. No. 98-363 §§ 6-7, 98 Stat. 435, 437-39 (codified at 23 U.S.C. § 158(a) (1988)) (Secretary of Transportation can withhold part of federal highway funds to states that have not raised their drinking age to 21).

¹⁶² Hester, *supra* note 3, at 1271.

¹⁶³ *Id.*

¹⁶⁴ McMillan, *supra* note 13, at 159.

families, yet bureaucratic red tape forces ICAs to stagnate at low levels and sending countries increasingly close their doors out of fear of abuse of the system. Meeting the needs of future prospective parents and children will require 1) making the INS process faster and easier and 2) taking steps to assure sending countries that the process is safe.

These twin goals are not incompatible. Abandoning the INA's restrictive orphan definition for a broader category of "adoptees" will allow more children to enter the United States. In addition, by building on established strengths of each level of government, the efficiency of ICAs can be increased. Specifically, the federal government should expand its role as an information source on adoption-related conditions worldwide and allow states to play a greater role in evaluating prospective parents.

To bolster the sagging reputation of the ICA system, the Service should require that all foreign adoptions be processed by licensed non-profit agencies, that no money change hands beyond documented costs, and that stiff penalties be imposed for the rare instances of baby-selling. Furthermore, the *ad hoc* process of enlisting the aid of elected representatives to challenge adverse adoption decisions should be replaced by a formal review mechanism for tough cases based on the established "best interest of the child" test.

The United States has nearly a century of experience at the state level in policing and processing adoptions on which to base reform of its ICA system. By cracking down on abuses and improving processing efficiency, the INS has the opportunity to reverse current trends against foreign adoptions and help to meet the needs of prospective parents and children worldwide.

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